

JC4TKAYC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 MELISSA KAYE,

5 Plaintiff,

6 v.

7 18 CV 12137 (JPO) (JLC)

8 NEW YORK CITY HEALTH AND
9 HOSPITALS CORPORATION, et al.,

10 Defendants.

11 -----x
12 New York, N.Y.
13 December 4, 2019
14 11:20 a.m.

15 Before:

16 HON. JAMES L. COTT,

17 Magistrate Judge

18 APPEARANCES

19 THE LAW OFFICES OF SPECIAL HAGAN
20 Attorneys for Plaintiff
21 BY: SPECIAL HAGAN

22 NEW YORK CITY LAW DEPARTMENT
23 OFFICE OF CORPORATION COUNSEL
24 Attorneys for Defendants
25 BY: DONNA CANFIELD
 ANTHONY DiSENZO

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1 (Case called)

2 THE COURT: State your name for the record, please.

3 MS. HAGAN: Special Hagan for plaintiff, Melissa Kaye.

4 My apologies, your Honor, for being late.

5 THE COURT: How come you're 20 minutes late?

6 MS. HAGAN: Traffic.

7 THE COURT: You drove?

8 MS. HAGAN: Yes.

9 THE COURT: Don't drive to the courthouse. I don't
10 know where you're driving from, but it's unwise to get here by
11 driving, it's better to take mass transit.

12 MS. CANFIELD: Good morning, your Honor, Donna
13 Canfield from the New York City Law Department representing the
14 defendants. With me from our office's e-discovery group is
15 Anthony DiSenso.

16 THE COURT: Good morning to both of you.

17 This is our first conference in this case. I have
18 done my best to try and get up to speed. I know there are a
19 number of issues we need to address.

20 The first thing I wanted to address, Ms. Hagan, is at
21 the end of the first letter you sent, the one to Judge Oetken
22 on November 19, you indicated you wanted to amend your
23 complaint. Is that something that you wanted to do?

24 MS. HAGAN: We're contemplating amending the complaint
25 because there's been a few additional facts that have taken

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1 place.

2 THE COURT: I don't know what "contemplating" means.
3 Either you will ask to amend or not. It's December 4, and fact
4 discovery closes on February 15, so we can't kind of let it
5 float. You mentioned it in a letter, so if you want to do it
6 then we have to figure out whether there's opposition. If
7 there is, we have to litigate it, we need to set a timeframe
8 for all that. This is what we have to do.

9 This case is, as you know --

10 MS. HAGAN: Yes, we are going to amend it.

11 THE COURT: Have you met and conferred about that?

12 MS. HAGAN: Actually, no.

13 THE COURT: Okay. So it's premature for me to then
14 resolve it today.

15 Ms. Canfield, do you have any view whether you're
16 going to oppose this or not?

17 MS. CANFIELD: I would like to see the proposed
18 amended complaint and then I would probably have an opinion on
19 it.

20 THE COURT: I expect that you would.

21 Okay. So we'll leave that to side for now, but just
22 be mindful that we have a February 15 discovery cutoff date,
23 and I'm just concerned that there's a lot of acrimony here but
24 not a lot of substance in what appears to be a relatively
25 straightforward case. So we need to toe the line here and move

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1 it forward properly.

2 Before we get into the discovery issues, let me ask
3 about settlement, because it seems to me there's been a lot of
4 stopping and starting in that regard. You never were able to
5 avail yourselves of a mediation program. Where do you stand on
6 settlement and how to proceed with respect to settlement in
7 this case?

8 MS. HAGAN: Judge Oetken asked, I guess the last time
9 we appeared before him, that I give defense counsel a demand
10 letter, and I did, and defense counsel never countered or spoke
11 or anything else.

12 THE COURT: Is the city interested in trying to work
13 towards settlement in the case or not in this posture, or where
14 are we in that regard?

15 MS. CANFIELD: The amount indicated in the demand
16 letter was far beyond what we would consider.

17 THE COURT: That wouldn't be the first time that ever
18 happened. That's quite normal.

19 MS. CANFIELD: So at this juncture in the litigation,
20 we would like to engage in discovery, and then if circumstances
21 change, which we don't believe they will, we will entertain
22 settlement. But because of acrimony in the beginning of just
23 getting dates with the mediator, having the ability to weigh in
24 on the appropriateness on the mediator, we thought at this
25 point why don't we litigate the case and revisit settlement

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1 when it seemed the parties were more cooperative in actually
2 reaching an agreement.

3 THE COURT: Okay. Well, keep in the back of your mind
4 we can discuss this, I suppose, down the road, that either
5 Judge Oetken or I can refer you back to a mediation program
6 and/or you can participate in a settlement conference with me,
7 if that would be more helpful, whatever you all think in that
8 regard. But I'm happy to, again, defer that until the case is
9 developed a little bit further. Sounds like that's what we
10 need to do.

11 MS. CANFIELD: You're correct, your Honor. I just
12 wanted to add one point. It appears from the complaint and it
13 appears from my discussions with H plus H that plaintiff is not
14 happy with her position, so I would imagine that any settlement
15 would involve either plaintiff's reassignment or plaintiff's
16 resignation or retirement from H plus H. I think that would be
17 the main sticking point for defendants in terms of settlement.

18 THE COURT: You mean not financial?

19 MS. CANFIELD: Well, the financial would certainly be
20 increased with those conditions that she retire or resign.

21 THE COURT: Well, okay, I think these are the sorts of
22 things that counsel should talk to each other about first and
23 then we can obviously discuss if there's a role the Court can
24 play in helping to facilitate settlement discussions or,
25 alternatively, having that mediator assigned to the case,

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1 that's fine.

2 MS. HAGAN: Your Honor, may I interject? I'm not sure
3 if I'm projecting or not.

4 THE COURT: Usually people stand when they speak. If
5 you can't, that's fine, but usually lawyers speak in court by
6 standing.

7 MS. HAGAN: Okay. Well, I will project.

8 I think that there's been a mischaracterization of the
9 dynamic between counsel. We are amenable -- plaintiff is
10 amenable to resolving this case. I think that there could be
11 discussion of settlement, but again, there had been no counter
12 offer. And as you basically pointed out, there usually is a
13 distance or a gap between the initial proposed amount and what
14 the parties actually come to some agreement on, and the
15 conditions.

16 So to some degree defendants are correct in that
17 plaintiff is not exactly happy in the current situation that
18 she's in. She does like what she's doing, but the managerial
19 structure is of concern for her.

20 THE COURT: Okay. Well --

21 MS. HAGAN: And that's changed some, from what I
22 understand, as recently as yesterday.

23 THE COURT: Let's do this, let's deal with other
24 issues and then we'll excuse the court reporter and we can have
25 some offline discussions about this perhaps collectively and

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1 maybe each party as well. I don't think we need to belabor the
2 record on this issue at this moment, but we can come back to it
3 before we conclude today.

4 All right. So let's talk about discovery. Now I
5 gather there are enough disputes you all are having about
6 timeframe and protocols and the like that to date the
7 defendants have literally not produced anything, is that
8 correct?

9 MS. CANFIELD: That is correct. We have not started
10 our collection because we have not agreed on the basic scope of
11 the collection with respect to the ESI.

12 THE COURT: The request was made on October 22nd, so
13 you had 30 days. So it was due on November 22nd, but you asked
14 for an extension on November 14, which Ms. Hagan didn't agree
15 to, but you nonetheless still haven't made a production, so
16 technically you're in default of the rule.

17 MS. CANFIELD: That is correct, your Honor, I
18 requested from Ms. Hagan additional time when I did not hear
19 from her in terms of custodians.

20 THE COURT: Right. And that's because you only want
21 to go back to the beginning of 2018 and she wants to go back
22 further than that, at least with respect to some of the
23 custodians. And you wanted to do this only once and not
24 multiple times, so you didn't want to collect from January 2018
25 to the present and then have to make a supplemental production.

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1 Am I right in assuming that, or incorrect?

2 MS. CANFIELD: The timeframe said -- we based our
3 collection or proposal based on the allegations in the
4 complaint, there was nothing --

5 THE COURT: That's not really my question to you
6 exactly. My question is: You don't want to do this more than
7 once.

8 MS. CANFIELD: Absolutely not.

9 THE COURT: You have an agreement that you should go
10 back to 2018. So you could have, by November 22nd, gone back
11 to January 21st, 2018 with respect to these custodians and done
12 a search and produced it by November 22nd. You could have done
13 that. You chose not to do that because you hadn't had that
14 agreement about whether there would be any custodians for whom
15 you had to go back further than 2018 and you didn't want to
16 have to do it a second time. So what I'm asking is: Is that
17 why you produced nothing?

18 MS. CANFIELD: You are correct that I did not produce
19 anything. I would say, respectfully, that you're incorrect
20 that between the production or the request date of October and
21 November 22nd that I would have been able to contact H and H,
22 make an appointment with our e-discovery group, collect the
23 material and list a vendor, go through and search all the
24 documents with what we propose is Continuous Active Learning,
25 CAL, do all the quality assurance checks that we need to do,

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1 send it back to a vendor for production, that would not happen
2 in 30 days.

3 THE COURT: Now it's December 4. I'm just concerned
4 about the timeframe here.

5 MS. CANFIELD: Well, at this point we don't want to do
6 it twice now because we know that there is an active dispute.
7 So rather than going and collecting and then having to do it
8 again, we were hoping for the Court's intervention.

9 THE COURT: Well, I am intervening, and I will make
10 some rulings today, and that's why we have a court reporter,
11 because presumably you will get the transcript of this
12 proceeding and use it as a guide as to how to proceed.

13 So as a threshold issue we have to decide the time
14 frame, correct?

15 MS. CANFIELD: Correct.

16 THE COURT: And you want to go back to January 21st,
17 2018, but not earlier, because the allegations in the complaint
18 essentially arise from that time frame going forward. Is that
19 a fair summary?

20 MS. CANFIELD: Correct. This seems -- the allegations
21 in the complaint seem to begin when the forensic evaluation
22 department was run by Corizon, and that contract with Corizon
23 HHC was terminated and that went under Correctional Health
24 Services. So what I understand reading the complaint, the
25 allegations in terms of her work hours, the type of work she's

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1 doing, starts in 2018. That being said, there are allegations
2 that she believes she has been unequivocally compensated, but
3 any compensation material would be in her hiring packet, that
4 would not involve ESI. The rate she's hired in and the civil
5 service requirement she's hired in is something that's part of
6 the personnel file.

7 THE COURT: Which hasn't been produced.

8 MS. CANFIELD: It has not been produced.

9 THE COURT: Why not? It's called rolling production,
10 Ms. Canfield, right? You could have produced it. It's not a
11 good look for the city to come to the Court two weeks past due
12 and say we have done nothing when there are certain things
13 clearly you could have done, like that.

14 MS. CANFIELD: Well, I can say we haven't done
15 nothing. I have just about ready for production -- plaintiff
16 served me with 197 admissions, so I have been working on that.
17 I have not challenged those, even though case law is clear that
18 163 is considered excessive. So some of the discovery requests
19 are out of bounds in terms of overburden and unduly burdensome
20 nature.

21 So you're correct, it doesn't look good we haven't
22 produced anything. I do have documents, but I also am
23 struggling with I think unreasonable discovery requests.

24 THE COURT: Well, I don't know anything about that
25 because that's not in the correspondence to me. So this is the

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1 first time I'm hearing about that.

2 MS. CANFIELD: You are correct.

3 THE COURT: So all I'm interested in, as is true in
4 every case from a judge's perspective, is having a level
5 playing field and making sure everyone has the information they
6 need in order to move a case forward on the merits. That's all
7 I'm interested in in ensuring for both sides.

8 MS. CANFIELD: Well, I also want to add that it was
9 not until about 10 o'clock last night that we received any
10 documents from plaintiff. So both sides were dilatory.

11 THE COURT: This may be a good time for me to say what
12 I was going to again say toward the end, which is I'm not
13 appreciating the way the case is getting litigated. The tone
14 in the letters, frankly, is not good. I really didn't
15 appreciate the tone in the letters. Our words matter, and you
16 have to be very careful when you say someone is obstructing,
17 Ms. Hagan; maybe you think that, or someone is not acting in
18 good faith, those are strong statements.

19 I'm not going to litigate that now and don't want to
20 hear from you now, I'm just going to say in any future
21 correspondence to the Court, be very, very careful about the
22 language you use about each other. That's my point. No ad
23 hominem, no careless use of adjectives or adverbs, stick to
24 the facts. It's just as powerful to say the city has produced
25 not a single document and it's now ten days past due. To say

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1 that speaks for itself. You don't need to dress it up,
2 Ms. Hagan, with language like obstruction, obscuring, failing
3 to cooperate, does not seem that they wish to pursue this
4 process in good faith, et cetera. Those are fighting words,
5 and I don't appreciate that unless they're fully justified.

6 Now you may think they're fully justified, but I think
7 you have to be very careful when you write to a court and use
8 phrases like that, especially in a very short, somewhat
9 abbreviated presentation. I'm interested in the merits of the
10 case and the parties getting what they need in a fair,
11 efficient, proportional, expeditious way. Rule 1 dictates that
12 to both of lawyers and the judge, speedy and inexpensive.

13 So we have to think about proportionality. This case
14 is getting more complicated than it needs to be. I frankly
15 don't understand, Ms. Hagan -- and I will give you an
16 opportunity to address this -- why, in the posture we're in,
17 we're talking about discovery on discovery when you don't even
18 have a piece of paper yet. So you don't even know what
19 failures there have been by the city other than they have given
20 you nothing.

21 We need to set a date by which they're going to make
22 production to you. You will get it, and then you will evaluate
23 it and then you will talk to Ms. Canfield and then she will
24 either say you're right, I will give you these things, or she
25 won't, or it will be something in between. And then you will

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1 make a judgment as to whether you want to avail yourself of the
2 Court to try and resolve that next dispute. That's how this
3 has to work. It can't just work: I want to have all of these
4 things when I don't even know what I'm getting or not getting
5 yet.

6 Go right ahead.

7 MS. HAGAN: Well, I guess I would like to start
8 somewhat as far as the discovery demands and when Ms. Canfield
9 actually received them. I emailed Ms. Canfield all of my
10 discovery demands back in July, July 23rd, to be exact. I
11 didn't serve her with them until October, but she's had them
12 since July. So that's to begin with.

13 As far as the -- it was not an issue of what actually
14 e-discovery platform that -- what actual methodology that
15 they're using. What I have asked Ms. Canfield to do is to
16 engage in a transparent and cooperative process in actually
17 producing the ESI. That's why I proposed an ESI protocol, so
18 that we would be accountable to each other and the Court. It
19 wasn't an issue with exactly what platform they chose. But
20 with CAL specifically -- and the case law supports this -- the
21 way it's set up --

22 THE COURT: The case law supports what exactly?

23 MS. HAGAN: The fact that the parties really need to
24 be cooperative and working together from the beginning. You
25 are looking at the *Silvermore*, you're looking at the *Rio* case

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1 and also looking at least a handful of cases throughout the
2 country which contemplate that the parties cooperate with each
3 other from the beginning of the ESI collection process.

4 I think the first issue that Ms. Canfield and I
5 actually had a problem with was even disclosure of what vendor
6 they were using, what platform they were using, so that we
7 could use the same language to communicate with each other at
8 least so I could understand exactly what exactly the document
9 universe were.

10 THE COURT: Why does it matter to you at this moment
11 in time who the vendor is? I don't understand why that matters
12 at this moment. It might matter, but I don't know why it
13 matters right this minute.

14 MS. HAGAN: The reason why it matters is because when
15 we met in front of Judge Oetken, Ms. Canfield -- even though
16 she disputes this -- said that there was going to be a lot
17 emails and a lot of e-discovery in the case. At that point --
18 I may have suggested at that point that we should develop ESI
19 protocol, and Judge Oetken at that point agreed.

20 So when we left, I was under the impression that the
21 parties were going to work together to develop an ESI protocol.
22 As such, I proceeded accordingly. Then I proposed the ESI
23 protocol to Ms. Canfield and I received nothing more. But some
24 of the basic questions of ESI protocol that you will see in
25 other cases is the parties know which vendors are being used,

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1 which platforms are being used.

2 THE COURT: But that's discovery on discovery, right?

3 MS. HAGAN: Not necessarily.

4 THE COURT: Sure, it is, because a lot of times
5 e-discovery is produced and there's no back and forth about how
6 it was prepared because it's deemed to be adequate by the
7 recipient. But your concern in advance -- you're worried in
8 advance you're not going to get what you think you should get.

9 MS. HAGAN: Not exactly.

10 THE COURT: There's an old saying that the judge I
11 clerked for many years ago used to say: Don't trouble trouble
12 until trouble troubles you. But I think you're troubled
13 already because you haven't gotten anything, but you want to
14 know eight different things about what they're doing and how
15 they're going to produce it.

16 MS. HAGAN: Not exactly. I know you're citing the
17 *Federal Review* case when you're saying discovery upon
18 discovery.

19 THE COURT: I didn't make up the concept of that.

20 MS. HAGAN: No, no, I know you're citing it.

21 THE COURT: I'm not citing any particular case.

22 MS. HAGAN: You're referencing it to some degree. I
23 think that's where I got the phrase from.

24 But in that case it appeared that there were gaps in
25 discovery. I'm not questioning that. I'm not questioning

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1 whether or not there are gaps, I'm trying to understand from
2 the beginning when you're going to engage in the ESI process
3 that's transparent and cooperative that you know exactly how
4 many documents we're talking about.

5 I have asked Ms. Canfield have you done a basic
6 search, do you know how many documents, what the ballpark is we
7 are talking about. Let's say you just did a basic run with my
8 client's name and the four defendants that are named, I have
9 gotten no numbers whatsoever.

10 So I said look, it makes sense for us to have an ESI
11 protocol from the beginning so we're all on the same page. I'm
12 not disputing whether or not they should use CAL versus keyword
13 searches. However, because of the nature of CAL and because of
14 how it's not as interactive as a keyword search, because
15 actually the courts have found the other way, that because of
16 the nature of it the parties have to cooperate more because you
17 have to negotiate from the beginning rather than perhaps --
18 there's I guess a negotiation between the keyword searches and
19 custodians.

20 THE COURT: Those discussions you have had, correct?

21 MS. HAGAN: Actually, no. I have asked her, I have
22 proposed --

23 THE COURT: I'm confused about that then. I thought
24 there were eight custodians that were going to be searched. Is
25 that what you decided unilaterally?

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1 MS. HAGAN: No, we discussed the custodians.

2 THE COURT: That's what I'm saying. You had those
3 preliminary discussions and they're going to search those
4 custodians for your client's name.

5 MS. HAGAN: Well, they didn't do that.

6 MS. CANFIELD: If I may, your Honor, I want to clear
7 up -- there was no transcript at the Rule 16 conference before
8 Judge Oetken. I ordered it, there's no transcript. I was
9 hoping there was.

10 What happened at that conference, because I was made
11 aware that ESI -- she was interested in collecting ESI, that if
12 she wanted to provide any scope or timeframes for ESI she get
13 it to me as soon as possible because of how long it takes to
14 collect and go through the material. I did not hear from
15 Ms. Hagan until I called her and left a message in November
16 around the time that this dispute started, and I said: Do you
17 want to wait? This is what I have. This is what I'm going to
18 run. And that is what started the conflict.

19 So looking back, perhaps I should have just --

20 THE COURT: Could I beg of you both, could we just
21 move forward?

22 MS. CANFIELD: Yes.

23 THE COURT: Let's deal with the merits of all of this.
24 Let's get to the heart of this instead of just talking about
25 all the fights you all have been having. It's disappointing

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1 and discouraging and probably demoralizing to my law clerk to
2 see two accomplished, articulate lawyers fighting about basic
3 and simple things here.

4 So let's talk about the time frame. Ms. Hagan, why
5 should it go before January of 2018?

6 MS. HAGAN: My client started complaining about pay
7 parity back in 2012.

8 THE COURT: Pay parity, how would that be implicated
9 by e-discovery?

10 MS. HAGAN: There were email exchanges between at
11 least my client and Elizabeth Ford that predate the 2018
12 cutoff. Ms. Canfield also agreed to earlier cutoff dates for
13 Mr. MacDonald, Ms. Yang, and I believe Mr. Wangel.

14 THE COURT: Earlier meaning what?

15 MS. HAGAN: 2015.

16 THE COURT: Is that right, Ms. Canfield, you'll go
17 back to 2015 for those individuals?

18 MS. CANFIELD: No, I agreed, because she previously
19 worked for Dr. Ford, and Dr. Ford is also employed by Bellevue,
20 as is plaintiff, that I would go back earlier; but not Wangel,
21 because Mr. Wangel did not start working until 2018, as did
22 Dr. Jain, not until 2018. Then after I offered the concession
23 for this person we'll go back farther, and the next time we
24 spoke she added another custodian.

25 I'm trying to manage how much and the cost of

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1 collecting ESI --

2 THE COURT: Maybe the most efficient thing to do is I
3 have the draft protocol that Ms. Hagan sent on page 14, there's
4 a list of nine custodians and then there are dates. Is that an
5 accurate reflection of where things stand or is something
6 different?

7 MS. CANFIELD: No, it's not.

8 THE COURT: So can you then tell me what --

9 MS. CANFIELD: What we had agreed --

10 THE COURT: Let's take them one at a time. Ms. Ford,
11 she wants to go back to 2011. And what is your proposed time
12 period if it's not that?

13 MS. CANFIELD: The farthest I would go back is 2015.

14 THE COURT: 2015. And the reason for that is?

15 MS. CANFIELD: It's three years back from when she
16 filed the complaint. I don't think there's anything
17 responsive. It's not material and relevant to any allegations
18 in the complaint. But if she's concerned there might be some
19 correspondence regarding pay equity issues, I will go back to
20 2015. 2011 I think is way too far back.

21 THE COURT: Why should we go back to 2011 with respect
22 to Ms. Ford?

23 MS. HAGAN: My client started complaining to Ms. Ford
24 and to management back in 2012, and there are paragraphs in the
25 complaint, specifically paragraph 40, which goes into a

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1 discussion about how she started complaining to Ford and
2 management about pay parity. So it's plaintiff's position that
3 the ESI should go back at least to that, at least to 2011,
4 because at least -- I would concede 2012, but 2011 would be
5 safe.

6 THE COURT: Could you ask maybe your colleague,
7 Ms. Canfield, to address this, is there any -- if you're going
8 to be searching Ms. Ford's email going back to 2015 for the
9 plaintiff's name, how is it any more burdensome to go back
10 three more years in time, especially if it's going to be
11 discrete as to something like this and there may be little to
12 no other production related to it?

13 MS. CANFIELD: I would just pose a question: How many
14 emails do you get a day? There could be plenty of emails that
15 we have to collect, and that has to be stored, and then we'll
16 go through them. I don't see the cost that -- the
17 proportionality in terms of what the allegations are and what
18 the cost burden is going to be on us --

19 THE COURT: That's what I'm asking, what is the cost
20 burden to go back beyond 2015?

21 MS. CANFIELD: We don't know until we collect, but I
22 would say if it goes to EPA -- there's an EPA claim in 2015,
23 and 2011 is going to be the same, there's liability there. And
24 if there's a retaliation claim because she complained about
25 this and we find something in 2015, it doesn't matter, she

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1 still hasn't established her retaliation claim. I just don't
2 see the discovery going back is proportional to her making her
3 prima facie case.

4 THE COURT: Is going beyond 2015 solely related to pay
5 parity?

6 MS. HAGAN: Yes.

7 THE COURT: And the statute of limitations for that
8 claim is what?

9 MS. HAGAN: Six years.

10 THE COURT: But why is Ms. Canfield wrong in that?
11 I'm not sure it's six years.

12 MS. CANFIELD: It's not six years, it's three years.

13 THE COURT: I think it's three years, but I could be
14 wrong.

15 Why is Ms. Canfield wrong, Ms. Hagan, that if in fact
16 there is email in relation to the pay parity complaints your
17 client has made to Ms. Ford in 2015 that that isn't just as
18 actionable as any correspondence with her in 2013?

19 MS. HAGAN: Well, there are specific statements that
20 Ms. Ford made in an email to my client about her civil service
21 title and the ability to address the pay parity issues, and it
22 started back then. And we are arguing that that Ms. Ford took
23 that animus into the new administration of management.

24 So we're talking about Yang and other subsequent
25 managers that Ms. Ford and my client actually had. And there

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1 are cases that examine timeframes before and after, like
2 windows, and I don't see -- I'm not really even sure what the
3 issue would be for defendants to go back an additional four
4 years with that specific keyword.

5 THE COURT: Because Ms. Ford had a lot of interaction
6 with your client that will produce a lot of emails that have
7 absolutely nothing whatsoever to do with this case, which will
8 then make it burdensome for them to have to cull through them
9 to find the three emails out of 4,000 that have to do with pay
10 parity is, in a nutshell, I think the point.

11 MS. HAGAN: But they haven't -- first off, I guess
12 what we're arguing is that earlier emails establish the animus,
13 the gender discrimination and pay parity issues. We're saying
14 that the intention starts there, and that's why we're seeking
15 to get those emails at an earlier date.

16 THE COURT: I don't see that in your complaint.

17 MS. HAGAN: That's why we're proposing to amend it.

18 THE COURT: You can't do that. That's really not a
19 legitimate argument to make in an unamended complaint we are
20 nonetheless seeking to develop the scope beyond what is in the
21 current complaint.

22 MS. HAGAN: There are allegations in the amended
23 complaint that my client complained to Ms. Ford and that -- I
24 should say Dr. Ford, and Dr. Ford said getting pay parity or
25 getting change around here is like getting elephants to move

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1 and stuff, something to that nature, and the --

2 THE COURT: Here's what we're going to do, because
3 we're not going to spend the entire day here. And we started
4 20 minutes late so we're already past where I thought we would
5 be done. It's already 10 of 12:00.

6 My order is that the city is directed to go back to
7 2015. You will get the production. You will see what it is.
8 I'm denying the application to go back before that without
9 prejudice. If you could make a more substantive basis for why
10 you need information, once you have what you do have, for
11 information before that I will let you renew the application.
12 But it strikes me as disproportional, given what is in the
13 current pleading and given what I otherwise know. So if the
14 complaint is amended and the production is inadequate, you
15 could revisit it, but on the framework for today it's 2015.

16 Now I hope we're not going to have to go through all
17 other eight for ten minutes each because this will take a long
18 time.

19 Is it Mr. Jain, J-A-I-N, and April 2018 to the
20 present, and do we both agree on that one?

21 MS. CANFIELD: Defendants agree.

22 MS. HAGAN: Yes.

23 THE COURT: Okay. Great. So that's good.

24 Then it's Mr. MacDonald, plaintiff proposes the 2015
25 date and the defendant proposes 2017. So what's the disparity

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1 there?

2 MS. CANFIELD: We actually proposed that 2018 date.
3 I'm really confused, I don't see what relevancy Dr. MacDonald
4 has to this case, so --

5 THE COURT: Well, you'll have to help me because you
6 know the players and I don't. What is or was his relationship
7 to Dr. Kaye?

8 MS. CANFIELD: I don't know.

9 MS. HAGAN: He's her indirect supervisor.

10 THE COURT: Indirect supervisor. What does that mean?

11 MS. HAGAN: She communicated with him at times as far
12 as the pay parity issue, and she also complained about
13 discrimination to Mr. MacDonald.

14 THE COURT: Beginning -- when did the relationship
15 begin?

16 MS. HAGAN: Well, he actually -- they have been
17 interacting with each since he got hired in 2015.

18 THE COURT: Why are you going back to 2015? Because
19 you're saying that she had interactions with him about
20 discrimination and pay parity for that period of time?

21 MS. HAGAN: And malfeasance. Yes, she has been
22 complaining for a long time. It didn't just start.

23 THE COURT: Can I ask, by the way, if you're going to
24 search the plaintiff's name you're going to get a lot more
25 production than if it is with other terms as well that could

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1 narrow this in some way. Shouldn't this search be undertaken
2 simply not by the plaintiff's name but with other terms such as
3 discrimination, retaliation, pay, pay parity, something along
4 those lines?

5 MS. CANFIELD: We're fine with search terms. We
6 thought to expedite things we would collect from the time
7 period and use plaintiff's name because --

8 THE COURT: That's up to you. You know better than I
9 what is going to be more costly or burdensome to you. I'm just
10 concerned that these people have lots of interactions, I
11 suspect, a few of which may be relevant to the lawsuit, many of
12 which will be entirely irrelevant to the lawsuit, but the
13 broader your search, the more work it's going to end up being
14 to have to cull through it.

15 MS. CANFIELD: Correct. We're just concerned about
16 getting this moving. Negotiating search terms is just
17 something else that we have to do. We're hoping today if we
18 could streamline the collection period and search her name.

19 THE COURT: You're going to just search her name in
20 this collection period for these custodians?

21 MR. DiSENZO: Your Honor, Anthony DiSenzo for the City
22 of New York.

23 I think our theory was we're talking about just
24 collecting -- we're using the search term to collect the data,
25 so we're not running these terms in a database. I'm not sure

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1 how complex the search terms can really be. It depends on what
2 the compliance tool is that the specific agency in this case is
3 going to use to collect.

4 THE COURT: Well, you have some sense of how you're
5 going to do this, do you not?

6 MR. DiSENZO: We do, but I think as a general matter
7 when we collect we typically collect broader and then narrow
8 down in the database a couple of different ways; it could be
9 search terms, it could also be Continuous Active Learning or
10 another tool that we use in lieu of search terms.

11 THE COURT: And to Ms. Hagan's point, that does need
12 to be done collaboratively. You can't just do it on your own,
13 because if you do it on your own you will be in my courtroom
14 every week, and I don't have time for you to be in my courtroom
15 every week.

16 MS. CANFIELD: That's why we're here. We want to get
17 the scope, the custodians, and the time period, and we want to
18 do Continuous Active Learning and do everything with
19 plaintiff's name, and then from there the computer does its own
20 production.

21 THE COURT: But you have to be talking to Ms. Hagan
22 about what it is you're going to ask your computer to do,
23 because it's otherwise having an ex parte conversation with
24 your computer. And I want it not to be an ex parte
25 conversation, otherwise whatever you produce I'm going to guess

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1 that Ms. Hagan will somehow be unhappy about it and then you'll
2 be right back here and we'll have moved the boulder down the
3 hill about three inches, and I want the boulder to move
4 completely down the hill.

5 MS. HAGAN: Your Honor, this is the precise reason why
6 I was saying we should work together.

7 THE COURT: I'm your ally on that.

8 MS. HAGAN: Thank you.

9 THE COURT: I am all in favor of cooperation, and I
10 want to make sure that everybody knows that that has to happen.

11 If what you're telling me is you think the most
12 efficient way, however proportional you're willing to live with
13 it is, we're going to define for each custodian a timeframe,
14 you're going to search that custodian's email collection for
15 that time frame, then you're going to have the universe of
16 documents. We'll say it's 10,000 documents. Then once you
17 have that subset of documents you will talk to Ms. Hagan about
18 how you will search that subset of documents to make a sub
19 subset of them that are relevant to the lawsuit by having
20 search terms that hopefully you can agree on. Because it's not
21 rocket science, in a case like this, as to what it should be.
22 That sounds fine to me as long as you're working together so
23 that she understands whether using CAL or some other TAR system
24 to drill down into that sub subset, that's all fine with me, as
25 long as there's communication in that regard.

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1 MR. DiSENZO: Your Honor, if I could be heard, I want
2 to make sure I can clarify some of the points that were raised
3 in the letter, because I think there is some confusion about
4 the process that was contemplated initially in the discussion.

5 With the CAL approach, a lot of the issues that arise
6 that arose in the earlier cases with previous versions of TAR
7 are no longer at issue. CAL is essentially just a
8 prioritization of the order in which you review the documents.
9 So there is no seed set training, there is no complicated
10 control set validation process, it's just you're going to start
11 reviewing the documents with the machine watching you and
12 learning what's relevant and it's reordering the order of
13 documents and bringing those responsive documents up to the
14 front of the queue. And once you stop seeing responsive
15 documents, we take a sample to make sure that we're not leaving
16 anything behind, and then we complete the review, but there is
17 no seed set.

18 THE COURT: Okay. But with all due respect, I think
19 of some of what you're doing now is conducting a meet and
20 confer in the courtroom in my presence. And a lot of these
21 conversations don't need to be in front of me or in the
22 courtroom but need to be behind closed doors in a conference
23 room or on the phone in which you all are explaining to
24 Ms. Hagan how your process is going to work, because I think
25 she doesn't know at least some of what you're telling me or

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1 hasn't heard it from you until right now.

2 Is this news to you, some of what you're hearing?

3 MS. HAGAN: To some extent. I think Mr. DiSenso is
4 leaving out to some degree that even as we spoke in court he
5 went back and forth between what would be keyword search and
6 what would be a CAL methodology.

7 THE COURT: I didn't hear that.

8 MS. HAGAN: At some point he was talking about whether
9 or not they would use terms to narrow things down. This is
10 before this last discussion. At first he was talking about how
11 they were going to go through the universe of documents. He
12 kind of vacillated between a keyword search and CAL. I
13 understand -- it's my understanding before I came in here today
14 that we were just going to be dealing with CAL, but I wanted to
15 understand exactly what process they were going to go through
16 to get the universe of documents. They still have to have a
17 base of documents, a program, the computer --

18 THE COURT: That's what we're talking about. That's
19 why we're setting a timeframe. The documents for these nine
20 custodians requires us to set a time frame.

21 And you'll have a base of documents, is that right?

22 MS. CANFIELD: Yes, timeframe, and collect with
23 plaintiff's name, so it will be a very, very broad collection.

24 THE COURT: I understand that. I think we said that.
25 We need to move in order --

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1 MS. HAGAN: I just have -- not about the terms, I
2 don't understand why we can't have a protocol that I sign off
3 on, your Honor, because I think that would keep them honest and
4 on time.

5 THE COURT: Because it's premature, that's why.
6 Because you need to receive production and then determine if
7 there's some deficiency in it that warrants some kind of -- you
8 could call it a protocol, to me it's just getting Court rulings
9 because there are disputes that need to be resolved between the
10 parties.

11 Not every case involving e-discovery has a protocol.
12 With due respect, Ms. Hagan, I have been here ten years, and I
13 think I have had less than five cases with protocols and I
14 think I had a hundred cases with e-discovery. So you might
15 think it's the best way to proceed, and maybe in some other
16 cases it's been useful to you. It's premature today for me to
17 review a 16-page document that you submitted that Ms. Canfield
18 hasn't even responded to yet, and there's been no production
19 yet for me to evaluate whether some protocol needs to be
20 imposed today.

21 Let's finish with these custodians so we can move
22 along here. So for Mr. McDonald, when did he start working
23 with Dr. Kaye? I'm not entirely clear on that.

24 MS. HAGAN: August 2015.

25 THE COURT: And we can't go back to 2015 because?

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1 MS. CANFIELD: To expedite things, we'll go back to
2 2015.

3 THE COURT: Okay. What about Mr. Wangel? There seems
4 to be agreement of January 2018, correct?

5 MS. CANFIELD: Correct.

6 MS. HAGAN: Yes.

7 THE COURT: And for Ms. Yang, it's between January and
8 December of 2015. Why is there that disparity?

9 MS. CANFIELD: I could speak for defendants. It's
10 three years back from the filing of the complaint. We went
11 back three years, statute of limitations.

12 THE COURT: Why does it need to go back beyond that?
13 I don't know what the relationship again between Kaye and Yang
14 is that determines any of this. You all know these facts, I
15 don't.

16 MS. HAGAN: Ms. Yang was my client's indirect
17 supervisor since she started.

18 THE COURT: Let's say January 2015, since we're going
19 back to that for these others as well.

20 Now Mitchell Katz, there's an objection to this
21 custodian all together. What's the nature of that objection?

22 MS. CANFIELD: It's my recollection that this
23 individual, according to what I remember of the conversations
24 with plaintiff's counsel, is that this individual attended a
25 disciplinary conference, I believe, and that was the only

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1 purpose of the collection. And I suggested to plaintiff's
2 counsel that if he was in any correspondence with plaintiff's
3 supervisors, like Dr. Jain or Dr. Ford, their emails would be
4 captured, would capture everything, and it would be unnecessary
5 to collect him if the collection was for that limited purpose.

6 THE COURT: Is that the only interaction he had with
7 plaintiff?

8 MS. CANFIELD: That's my recollection.

9 THE COURT: Was there anything beyond this
10 disciplinary proceeding?

11 MS. HAGAN: My client has been complaining about
12 discrimination.

13 THE COURT: I know that, but what does Dr. Katz have
14 to do with anything related to those complaints other than
15 that? Ms. Canfield says he was involved in a disciplinary
16 proceeding, which I gather Dr. Ford and Dr. Jain were also
17 involved in, from what she says, so why would there be uniquely
18 documents corresponding between your client and Mitchell Katz?
19 That's my question.

20 MS. HAGAN: Well, Mitchell Katz is the CEO of H and H,
21 and my client is like I guess three steps removed, but not that
22 far away from him, I guess, as far as the hierarchical food
23 chain.

24 She actually complained to everyone in this managerial
25 structure, and Mr. Katz has an obligation, once he is

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1 brought -- once discrimination or retaliation has been brought
2 to his attention to actually act upon it. And it's our
3 argument that he willfully did not do anything, and in fact
4 participated in retaliation against my client.

5 THE COURT: What is his position?

6 MS. HAGAN: He's the CEO of H and H. But my client
7 was a very senior person in the organization.

8 THE COURT: Well, what interaction does your client
9 have with Mr. Katz?

10 MS. HAGAN: Well, she emailed him on -- she CC'd him
11 on emails, and actually --

12 THE COURT: I haven't heard enough to convince me that
13 he should be involved in the collection, so denied without
14 prejudice. If you can make some case that he has unique
15 information that hasn't otherwise been produced, you can renew
16 it, but not I'm requiring any search at this time.

17 Now the plaintiff herself. That seems agreed, or no?

18 MS. CANFIELD: We'll go back to 2015.

19 THE COURT: This says 2011.

20 MS. CANFIELD: I never agreed to 2011, I only agreed
21 to the statutory time period. We agreed to 2015.

22 THE COURT: January 2015.

23 MS. HAGAN: Is there a possibility -- we're not
24 getting everything, could we get --

25 THE COURT: You never get everything. Let me tell you

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1 a little secret, which is if you wait until February 1st to
2 take depositions in this case because you don't have all the
3 documents, you're going to run out of time.

4 MS. HAGAN: No.

5 THE COURT: So I'm hard pressed to understand why the
6 statute of limitations that's implicated here isn't at least
7 guidance for purposes of how we should frame what could
8 potentially be fairly extensive discovery. And until you know
9 what is produced, you are not going to be in as good a position
10 as you may be to tell me why you think that the production is
11 inadequate, because the critical documents are from 2013, which
12 you can't tell me, sitting here today, you're just sort of
13 making a broader argument that she's been complaining from time
14 immemorial. But to complain from time immemorial doesn't give
15 you license to get documents from time immemorial because
16 that's not proportional. And as a colleague of mine said not
17 that long ago, "Proportionality is the new black," so we have
18 to abide by that, because I do think it's important and in
19 everyone's interest.

20 You have an obligation and the Court has an obligation
21 under Rule 1 to ensure that discovery is inexpensive. That's
22 why I keep asking questions about the burden, and some of this
23 they're willing to undertake, even though it seems to me the
24 way they're going to do it might be more burdensome than some
25 other way, but they have chosen do so and I'm not going to

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1 second guess that.

2 We'll go back to January 2015 for Ms. Kaye, again
3 without prejudice, Ms. Hagan. If there's some application you
4 want to make after production has been made that you think
5 justifies a further search, I'm happy to hear it, but that's
6 where I come out today.

7 And Andrea Swenson, January 2018, and that's agreed?

8 MS. CANFIELD: I'm not quite sure what her role is in
9 the litigation.

10 THE COURT: Who is she and what is her relationship to
11 the allegations in the complaint?

12 MS. HAGAN: Andrea Swenson complained about my client
13 and participated in disciplinary charges against my client.

14 THE COURT: Is she a supervisor of your client?

15 MS. HAGAN: I'm not exactly sure. She's not a
16 supervisor, but there was an incident that took place between
17 she and my client, allegedly, and my client was brought up on
18 quasi-disciplinary charges involving Ms. Swenson, and we're
19 arguing that --

20 THE COURT: Your client was brought up on disciplinary
21 charges related Ms. Swenson, is that what you said?

22 MS. HAGAN: Yes. So we were seeking e-discovery for
23 her interaction with Ms. Swenson, and I guess what transpired
24 around --

25 THE COURT: When was this incident that you are

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1 talking about?

2 MS. HAGAN: I would say it would have been in the
3 spring of this year.

4 THE COURT: Spring of 2019?

5 MS. HAGAN: Yes.

6 THE COURT: Why are we going back to January 2018 for
7 her?

8 MS. HAGAN: I just wanted to make sure that we covered
9 the entire timeframe period.

10 THE COURT: I don't know what that means. Why don't
11 we go back to January of 2019.

12 MS. HAGAN: Okay.

13 MS. CANFIELD: That's fine.

14 THE COURT: January 2019, based on what I just heard.

15 MS. HAGAN: And, if necessary, could I make an
16 application?

17 THE COURT: Yes. I mean, again, I have a finite
18 amount of information about all of these people. I'm just
19 trying to do my best given what you all are telling me in terms
20 of who they are in relation to the plaintiff and the
21 allegations in the current pleading. Any application that you
22 want to make with respect to these custodians going forward
23 beyond the timeframe you can make, I'm not denying that, with
24 prejudice, but you will have to have a pretty compelling
25 argument to convince me because we need to move the case

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1 forward. And I think once production is made you'll have a lot
2 of material to think through and work with and you'll have to
3 decide what is proportional for your purposes.

4 The last person on the list is Anansa Brayton. Who is
5 this person and is there agreement or not agreement?

6 MS. CANFIELD: I don't know who she is.

7 THE COURT: Who is she?

8 MS. HAGAN: She worked with my client. She actually
9 just resigned like a few weeks ago, but they were in the clinic
10 together.

11 THE COURT: What makes her someone whose email should
12 be searched? Why will she be a relevant witness here?

13 MS. HAGAN: There were issues involving my client
14 being excluded from meetings, being excluded from policy making
15 Ms. Brayton was actually involved in, and my client alleges
16 that she was part of the marginalization she experienced.

17 THE COURT: I thought you said she was a peer.

18 MS. HAGAN: She's a peer, but Ms. Brayton was actually
19 included while my client wasn't. So we're trying to establish
20 the extent of which she was excluded from meetings.

21 THE COURT: Why would any emails Ms. Brayton have
22 address that?

23 MS. HAGAN: There are issues involving Ms. Brayton's
24 workload, Ms. Brayton's performance, Ms. Brayton's inclusion in
25 meetings with respect to my client during the relevant time

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1 period.

2 THE COURT: This is a gender discrimination case,
3 right?

4 MS. HAGAN: It's a gender discrimination case but also
5 my client alleges she that was retaliated against after she
6 engaged in protected activity, including filing claims of
7 discrimination as well as claims of malfeasance.

8 THE COURT: What would Ms. Brayton have to do with any
9 of that?

10 MS. HAGAN: Well, she alleges that Ms. Brayton was
11 treated favorably because she didn't engage in those protected
12 activities.

13 THE COURT: I'm not persuaded. Sorry, I'm not going
14 to allow discovery of Ms. Brayton as a custodian at this time.
15 I think if what you say is true -- who was supervising Brayton
16 and Kaye at this time?

17 MS. CANFIELD: Jain.

18 THE COURT: Yeah, so you're going to see at least
19 preliminarily in that production relevant information related
20 to that, I suspect, if it does exist.

21 We have gone through the custodians' list, we have a
22 timeframe for all of them. What else do we need to today as
23 far as production is concerned, other than set a schedule for
24 it? Anything else?

25 Now you have your marching orders in terms of time

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1 frames and custodians, and the search term is the name of the
2 plaintiff, correct?

3 MS. CANFIELD: Correct.

4 THE COURT: How long is it going to take?

5 MS. CANFIELD: I was talking to Mr. DiSenso
6 beforehand, and it will depend on the universe of documents we
7 have once we gather them based on the timeframe.

8 THE COURT: Tell me what that means.

9 MS. CANFIELD: That means that once we have the
10 universe of documents we need to review, then we might have a
11 better idea as to how long it will take.

12 Am I correct in that assessment?

13 MR. DiSENZO: That is correct. Basically the reason
14 we can't give a timeframe for completing production --

15 THE COURT: Well, I will give you a timeframe if you
16 don't propose one, so propose one.

17 MS. CANFIELD: Well, I was going to propose just an
18 outside, with an extension of discovery that we work within
19 to --

20 THE COURT: We're already in December seeking an
21 extension of discovery?

22 MS. CANFIELD: Because --

23 THE COURT: Did you have these requests in July, as
24 Ms. Hagan said?

25 MS. CANFIELD: We rejected them as improper. It was

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1 prior to the Rule 16 conference. We rejected them.

2 THE COURT: So you stood on ceremony and she was
3 trying to expedite matters by giving you a heads up as to what
4 she was looking for, and you're penalizing her for doing that,
5 which I think is really not a good way to set the tone in a
6 lawsuit. Is that how they educate -- you're a very experienced
7 lawyer, Ms. Canfield, you've been before me many times. The
8 training of corp. counsel is informal discovery served in
9 advance of Rule 16 you can just ignore?

10 I'm not saying that because it was sent to you
11 informally in July that you had to respond in August, but it's
12 now December. You had a conference with Judge Oetken in which
13 he set a schedule of fact discovery deadline in February and
14 you have still done nothing, and now you're sitting here on
15 December 4th and asking for a discovery extension because you
16 don't want to produce anything until January. And why
17 shouldn't I hold your feet to the fire since you had this since
18 July?

19 It's just a question of priority, and if I said get
20 this done in one week you would figure out to how to get it
21 done in one week. I'm not saying it's going to be a week, but
22 you're saying Judge, let's have until April for fact discovery
23 and we'll produce this in January. And why should you be
24 rewarded for that? I don't know. Tell me why.

25 MS. CANFIELD: I certainly wouldn't characterize any

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1 of this as a reward.

2 THE COURT: I'm being a little loose with my language
3 in that regard, but I mean effectively the city abrogated to
4 itself an order not to have to produce anything until things
5 were worked out in court, and this has now taken until December
6 4th. Judge Oetken just referred this to me last week, so you
7 didn't know you were stuck with me until last week, but I'm
8 just eager to move cases along. That's my job as a magistrate
9 judge supervising discovery.

10 So I understand you have technological issues in
11 making this happen, but what's the realistic timeframe? I
12 can't allow you to not propose a timeframe. I need to know
13 what you think you need and then I will evaluate and hear from
14 Ms. Hagan about how realistic that is.

15 MS. CANFIELD: First thing, I never thought that we
16 were stuck with you, Magistrate Judge Cott.

17 THE COURT: Thank you in that regard.

18 MS. CANFIELD: I know you have some wisdom regarding
19 these issues, ESI, so I was actually happy that Judge Oetken
20 referred the case to you. Considering the holidays, I would
21 say at the beginning of January, the second week of January
22 full production.

23 THE COURT: But just if you don't mind, work me
24 through -- take me through logically how this is going to
25 play out after you leave the courtroom today. What's going to

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1 happen? You're going to be in touch with a vendor and schedule
2 what, and how would that work?

3 MS. CANFIELD: It sounds like the vendor we'll use for
4 CAL we already have a contract with, so --

5 MR. DiSENZO: That's not -- maybe I could speak to
6 this. We'll start, your Honor, by requesting the data from--
7 because this is an outside entity from us, we don't --

8 THE COURT: HHC?

9 MR. DiSENZO: Yes.

10 THE COURT: So you need to access through their IT
11 department the mailboxes for the custodians we've identified.

12 MR. DiSENZO: Correct.

13 THE COURT: How long would that take?

14 MR. DiSENZO: Could take up to two weeks.

15 THE COURT: Why so long?

16 MR. DiSENZO: These IT departments do not have a lot
17 of staff that handle ESI requests for lawsuits. Typically we
18 have to get the data by sending the hard drive out and then
19 back, so that adds a little bit of time depending on, again,
20 the size of the data that we collect.

21 THE COURT: Send it out to whom?

22 MR. DiSENZO: To HHC to where the IT department sits I
23 think in the Bronx.

24 THE COURT: But if you call an IT person at HHC this
25 afternoon and said we're before a federal judge who said you

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1 have one week to get this back to us, won't they get it back to
2 you in one week?

3 MR. DiSENZO: I certainly hope so.

4 THE COURT: I hope so, too. So let's assume it's a
5 week, not two weeks. So now we're at December 11, then you
6 have the mailboxes you need. What happens next?

7 MR. DiSENZO: So then we process the data in order to
8 index it, essentially be able search across it.

9 THE COURT: Is that something that the law department
10 has capabilities of doing or somebody else?

11 MR. DiSENZO: Our vendor will do it for us.

12 THE COURT: You have a vendor under contract at the
13 ready for this?

14 MR. DiSENZO: Yes.

15 THE COURT: Why can't that happen toward the end of
16 next week into the week of the 16th?

17 MR. DiSENZO: As long as we have the data by then we
18 should be able to process.

19 THE COURT: If I tell you that you have to get it from
20 HHC by the 11th, then you're turning it around the week of the
21 16th, and how long does that process take?

22 MR. DiSENZO: It can take two to three days, I would
23 say, and it should be completed.

24 THE COURT: Okay. And once that process that you've
25 just described is completed, is it ready to be produced or

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1 what?

2 MR. DiSENZO: No, at that point we would make a
3 decision about how best to narrow the universe for a review.

4 THE COURT: So that's then when you would engage
5 Ms. Hagan in conversation, because then you could tell her we
6 have 9,412 documents for these seven custodians and let's talk
7 about how we should search them, correct?

8 MR. DiSENZO: Potentially, your Honor. I am not sure
9 if --

10 THE COURT: Because this is where the rubber meets the
11 road and this is why Ms. Hagan I think wants a protocol and all
12 of that, which is once we reach this point in the process you
13 need to engage with her, because otherwise you're just laying
14 the foundation for more disputes. And I want you not to have
15 disputes, I want you to work together, and she's an experienced
16 lawyer who wants to work with you.

17 Now that doesn't mean reasonable people can't
18 disagree. I understand that, and I know you all do, too, and
19 I'm not deluding myself into thinking that I'm not going to see
20 you again in this case. I'm highly confident I will see you
21 again in this case, but in a way where you will be very laser
22 beam focused. Today has been very scattershot, the next time
23 will be laser beam focused.

24 So what I would suggest is once you've run this to the
25 point that you have said, before you undertake how you're going

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1 to cull and narrow the collection, you need to have a meet and
2 confer with Ms. Hagan. That's Judge Cott's informal protocol,
3 if you will, at that moment in time so that you will, before
4 Christmas, have those conversations.

5 Then I would say realistically, once you've had those
6 conversations, again you run into the holidays. And I am not
7 someone who wants people's holidays ruined by litigation,
8 because life is too short and people have families and other
9 commitments and I don't want lawsuits to have people working on
10 Christmas Eve at 5 o'clock or whatever other holidays people
11 may be celebrating. So we have to be mindful of that, and I'm
12 very mindful of that, but we need to make this move
13 accordingly.

14 MS. CANFIELD: I was going to add, again on page 6 of
15 document 51, that's the protocol proposed by plaintiff, I am in
16 agreement that the issues she has listed here -- and I think I
17 had proposed those in an email to Ms. Hagan back in November,
18 we are happy to have that be the scope of how we cull the
19 initial set of documents, those broad subject matter areas, if
20 that's something that --

21 MR. DiSENZO: Well, I think -- and this is the point I
22 was going to make, your Honor, is once we have the data
23 processed and we're going to make a decision about how best to
24 proceed with review, it may be that we don't apply search
25 terms, we just review the document. It's hard to say without

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1 knowing how many we have. Of course, if we were going to -- if
2 we thought the search terms were the best way to cull down the
3 data set we would reach out to Ms. Hagan about that, but --

4 THE COURT: What I don't want to have happen is
5 another conference where Ms. Hagan comes and tells me she's
6 essentially been kept in the dark about how you went about
7 providing whatever documents you do end up producing. That's
8 what I want to avoid, and the record will be clear so the
9 transcript will tell us what I just said.

10 Okay? That's what I want to avoid.

11 MS. CANFIELD: I do want to add one other point.
12 Regardless if we have search terms, if using that platform or
13 using CAL, Continuous Active Learning, I'm going to be the one
14 reviewing the documents. This is not going to be sent out to a
15 managed review team. I will be sitting at my desk, and I can
16 average 700 to a thousand documents a day if I'm on a tight
17 schedule and I put everything else aside.

18 It was my experience in the last case I had before
19 Judge Koeltl in using CAL that it really is a better way of
20 gathering documents because I could look at the document and
21 that goes directly to FMLA, that goes directly to equal pay
22 issues. So I think it's a more efficient way because you're
23 training the machine as you're reviewing the documents and
24 whole volumes -- say there's a media, she's getting newspaper
25 articles every day, and "retaliation" is in that newspaper

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1 article, the search terms, that same newspaper article or same
2 newspaper that she has delivered to her mailbox every day will
3 show up in search terms. But I have CAL, CAL will know that
4 retaliation term, that's unrelated to the type of retaliation
5 in this context, and it will exclude all of those documents.

6 THE COURT: Well, let me be clear, in the posture
7 we're in right now, I'm not here to micromanage what you should
8 do. I want you to do what you think. I just want you to talk
9 to Ms. Hagan about it so she understands at least at a macro
10 level what you're doing so that she could provide her thoughts
11 and input. And you will either accept them or not, and you
12 will make your production. And she may be totally satisfied
13 with the production. I don't want to predict she won't be.
14 But the more information you provide to her and the more input
15 she can give you about what she thinks she may want to get, the
16 less likely it is that we're going to be back here having
17 disputes about things. That's all.

18 I'm not trying to micromanage anything. You should do
19 your review. If you're sitting at your desk and looking at a
20 thousand documents, God bless you. I leave that up to you, and
21 you will be in the best position to know what to do. I think
22 it's unwise for judges to try to micromanage these types of
23 things, especially in this posture. Down the road we have to
24 see what happens and where that takes you all.

25 But realistically, let me ask another question, just

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1 trying to perempt some things: Are there going to be experts
2 in this case?

3 MS. HAGAN: I'm still conferring with my client about
4 that.

5 THE COURT: If there were to be an expert or experts,
6 what kind of expert are we talking about?

7 MS. HAGAN: Probably talking about the psych -- she's
8 a psychiatrist herself, but probably looking at someone who is
9 going to look at her mental health.

10 THE COURT: So for emotional distress-type purposes?

11 MS. HAGAN: Yes.

12 THE COURT: But you haven't decided that is what
13 you're saying.

14 MS. HAGAN: Right.

15 THE COURT: I don't want to speak for you, but I
16 assume not unless she does, then you might, but otherwise no?

17 MS. CANFIELD: Otherwise no.

18 MS. HAGAN: An actuary probably.

19 THE COURT: An actuary?

20 MS. HAGAN: Yeah.

21 THE COURT: Okay. Well, the reason I'm asking that is
22 because the way I would think about this is abiding by what
23 Judge Oetken set in the schedule, you have an expert deadline
24 in April, and as far as I'm concerned, what we can agree to
25 today is the April date will be all discovery, fact and expert,

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1 so that you don't get stuck having to take depositions back to
2 back to back the last week of the fact discovery deadline in
3 February. It seems to me, given the timeline now with this
4 electronic discovery, and realistically having an early January
5 production, an early January production is fine as long as we
6 extend the fact discovery deadline until April.

7 I'm going to be disinclined to want to extend it
8 beyond that, however, especially because to some of the points
9 Ms. Hagan has been making. We're talking about a longstanding
10 employee whose issues have gone on a long time, and the longer
11 the case goes on, memories fade, et cetera. So it's in
12 everyone's interest that I hold your collective feet to the
13 fire.

14 And I'm not going to be inclined to extend discovery
15 past the April date, but we have an April 9 expert discovery
16 deadline, and I'm prepared today to say that we can consider
17 that a deadline for all discovery purposes, especially when
18 there may or may not be experts. And if there are, they will
19 be pretty discrete in this case, and we can obviously deal with
20 that in due course.

21 If there are going to be experts, though, Ms. Hagan, I
22 think you can't decide that in April, you obviously need to
23 decide that by -- was there a timeline set for that? I can't
24 remember.

25 In any event, I would say by February you should

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1 decide and disclose so that there is time, if there's going to
2 be expert discovery taken, that can happen in the February to
3 April window. But we'll have the fact discovery window close
4 in April as well, so that gives you a little bit of time.

5 So in that end could we say realistically that the
6 production to Ms. Hagan can occur no later than the week of
7 January 6, and as early in that week as possible, can I say
8 like January 7, which is roughly a month from today, accounting
9 for the holidays of Christmas and New Year's where there are
10 multiple days where most offices are closed.

11 MS. CANFIELD: Is it possible to do the bulk of the
12 production say versus if there's something that is privileged
13 or confidential that needs to be processed through a privilege
14 log, that the bulk of the production that doesn't need
15 redactions that could be produced by that date, but if we could
16 have an additional week if we need to.

17 THE COURT: Maybe this is a good case for a 502(d)
18 order.

19 MS. CANFIELD: That was going to be my next issue,
20 confidentiality agreement and also a 502(d).

21 THE COURT: But if that was in place, why should we
22 delay production further?

23 MS. CANFIELD: Well, I doubt there will be
24 attorney-client material.

25 THE COURT: None of these people are lawyers.

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1 MS. CANFIELD: Like I said, I doubt there will be --
2 if anything, there would be -- because she does -- she's a
3 psychiatrist who conducts forensic examinations, so there may
4 be inmate information that we would need to redact. So any
5 redactions might need to come out.

6 THE COURT: If you have a 502(d) order and there's
7 some inadvertent production of some prisoner, you can deal with
8 it in due course if you discover it after the fact.

9 MS. CANFIELD: I would like to talk to my client about
10 that. They have certain obligations that they need to follow.
11 They have other laws that I'm not familiar with. I don't know
12 if a confidentiality order would -- a 502(d) only covers
13 attorney-client and not the personal information, and --

14 THE COURT: I think that's correct.

15 MS. CANFIELD: So we're saying the bulk of production.
16 If we could have another week for those --

17 THE COURT: What I would say is you will make your
18 production by January 7. If there's something that you're not
19 producing on January 7 because of information that needs to be
20 logged, you can have until the 14th to do that. But I'm
21 deeming the 7th to be the date by which you're making your
22 production.

23 Frankly, if there's any way to make any sort of a
24 rolling production, I would encourage you to do that. If there
25 are certain documents you have looked at on December 20 and you

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1 know they will be produced, let's say they're related to
2 Dr. Kaye and you know because you can see they're all
3 responsive to the issues that you just listed, there's no
4 reason in my mind that you should just hold off on that. I
5 think rolling productions can be very helpful. I suspect some
6 things that you have Ms. Hagan may already have, but that's
7 okay, that's confirmatory, I suppose, in some respects.

8 So I would encourage rolling production. I will set
9 January 7 as the date by which the production needs to be made
10 consistent with the time frame on the custodians we've set, and
11 any redaction/privilege type issue that warrants withholding
12 certain documents you would otherwise produce has to be
13 identified in a log or otherwise to Ms. Hagan no later than the
14 14th.

15 Okay?

16 MS. HAGAN: One thing, there are the outstanding
17 discovery demands, the requests for admissions, the
18 production -- I mean I have given defendants interrogatories,
19 requests for admissions and productions since July, and I don't
20 have anything from them.

21 THE COURT: Okay. Well, before we get there, I want
22 to close out the e-discovery production for our purposes today,
23 then we can go to non-e-discovery related discovery in the
24 remaining time.

25 Is there anything else e-discovery related that we

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1 need to address today now that I set timeframes for custodians
2 and timeframes for production or rules of the road?

3 MS. CANFIELD: I would say yes, overall, but if
4 plaintiff is planning on amending the complaint, I would
5 suggest that we know what the additional allegations are going
6 to be before I start reviewing documents.

7 THE COURT: We'll set a date for that and other
8 related things, but okay, other than that we're good to pass on
9 to other subjects, yes?

10 MS. CANFIELD: Yes. It's going to be difficult for us
11 to make that deadline. We'll do our best.

12 THE COURT: It's a Court order. You said January, I'm
13 giving you January. I could have said December.

14 MR. DiSENZO: Your Honor, I think the concern that I
15 have is not knowing how many documents that I have to review.
16 It's hard to know.

17 THE COURT: Do your best. I made my rulings. We'll
18 see where it takes us.

19 Now you'll amend your complaint by what date?

20 MS. HAGAN: January 6.

21 THE COURT: No, because it affects the production you
22 will get. Can't we do it a week from today?

23 MS. HAGAN: It's a pretty long complaint.

24 THE COURT: It's a 30-page complaint. But what are
25 you adding to it? Not 30 more pages.

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1 MS. HAGAN: My client and I have been going back and
2 forth for the last few months.

3 THE COURT: Today is the 4th.

4 MS. HAGAN: So I guess I could get it back by the
5 18th.

6 THE COURT: Two weeks from today.

7 MS. HAGAN: Yes.

8 THE COURT: What you're doing then is you're making it
9 very difficult for the production that you want to be
10 meaningful if these allegations are going to in some way
11 materially change the legal terrain, so to speak.

12 MS. HAGAN: So I guess we could do I guess the 11th.

13 THE COURT: Okay. I don't know what the scope of the
14 amendment is, so without knowing that and how extensive it is,
15 I don't know whether it will impact materially or not what it
16 is that Ms. Canfield needs to undertake. So we'll say a week
17 from today. And what you'll do is you are going to propose an
18 amended complaint, because you need leave of the Court unless
19 the parties agree.

20 So what I would suggest is this, we're talking about
21 the deadline for the amended complaint, so she's going to do it
22 by the 11th. What I would suggest is she send it to you on the
23 11th, then you will let her and the Court know whether you will
24 object to it. If you are going to object to it then we'll have
25 to have motion practice related to that, and I would say the

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1 following, which is: We're still pretty early in this case,
2 given no discovery has been produced, so I will be hard pressed
3 to deny a motion to amend unless there's really good reason.
4 The only good reason I could think of is if you basically
5 change the case. If you turn it into some other case or
6 something rather than sort of work on the edges of the margins
7 of the case, then I might have a different view.

8 But leave to amend is freely granted in a posture like
9 this, so I would think the city is going to have some pretty
10 compelling arguments to convince me why the motion should be
11 denied if we're putting her through the burden of making a
12 motion. Having said that, I don't know what the amendment is,
13 so I'm not making any advisory ruling here.

14 You will have until the 11th and you will have until
15 the 18th to let the Court know whether the amended complaint is
16 one that you're agreeable to filing. Obviously, all you're
17 doing is agreeing to it to being amended, not to any of the
18 allegations. And if there's a stipulation to that effect, you
19 could submit a stipulation and then I will grant permission to
20 Ms. Hagan to file the amended complaint.

21 And by the 18th, I think that should still give you
22 enough time to the extent it might impact your production.
23 Given what you have been telling me about your timeline, you
24 will have only gotten the mailboxes from HHC the previous week
25 and you will still be in process with your vendor then. So

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1 that should be fine. So 11th for the amended complaint, the
2 18th you need to let the Court know either by stipulation or in
3 letter opposing and the basis for why, and depending on what
4 you say then, I will set some schedule for motion practice if
5 it comes to that.

6 Now requests for admission, interrogatories, et
7 cetera, what's the timeline for that?

8 MS. CANFIELD: I can produce the interrogatories, our
9 responses and our objections, by next week. I do have a
10 concern about the admissions because --

11 THE COURT: We'll take them one at a time. So the
12 interrogatories a week from today?

13 MS. CANFIELD: Yes.

14 THE COURT: The 11th.

15 MS. CANFIELD: Yes.

16 THE COURT: Interrogatory responses will be provided
17 by the 11th.

18 Now the RFAs, how many did you say there were, 193?

19 MS. CANFIELD: 197.

20 THE COURT: Okay. I'm all ears. It's not in the
21 letters. I generally don't like having things in front of me
22 that the parties haven't identified to me before we get here,
23 but in order to avoid having more conferences, you'll answer
24 some of them, all of them, none of them? What's the concern?
25 And there's no blanket rule that says you can't have 197 RFAs,

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1 it's just are they appropriate or not appropriate. I haven't
2 seen them so there's no way I can opine on that. You have to
3 tell me.

4 MS. CANFIELD: I have responded to them up to 172.

5 THE COURT: You drafted responses?

6 MS. CANFIELD: I drafted responses.

7 THE COURT: You only have 25 more to go.

8 MS. CANFIELD: I do have 25 more to go but I do have
9 to follow up with my client on some of these. My biggest
10 concern is because they were so voluminous it was almost
11 impossible to respond to them within the 30 days as required
12 under the federal rules.

13 THE COURT: Can you respond by the 18th of December,
14 two weeks from today?

15 MS. CANFIELD: Since I'm already at 172, I believe I
16 can.

17 MS. HAGAN: Your Honor, may I interject, she's had --

18 THE COURT: You just got me to have her agree to
19 December 18 for responses, so what more is there to discuss?

20 MS. HAGAN: She's had them since July.

21 THE COURT: There are 197, and it's at the outset of
22 discovery, which is not usually when RFAs are usually served.
23 So I don't know exactly what admissions you're looking for, and
24 a lot of admissions aren't that useful unless there are things
25 like authenticating documents, none of which have been produced

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1 yet. And if you're using it as sort of a shortcut to getting
2 answers in depositions and the like, you're not going to
3 succeed in that regard.

4 So I think RFAs can be very useful, but they have to
5 be used carefully is all I'll say. Again I'm speaking
6 generically. I don't know what these entail. But in any
7 event, you will get responses by the 18th of December, and I'm
8 totally happy with that timeframe.

9 And by the way, I'm not issuing some order with all
10 these dates and stuff. You all order the transcript, so you
11 will have it all in there.

12 What other loose ends, if anything, do we have, other
13 than we'll go off the record and excuse the court reporter and
14 talk a little more offline about settlement. Anything else we
15 need to discuss on the record?

16 MS. HAGAN: Yes, the 502(d) order, when would your
17 Honor like for the parties to submit that?

18 THE COURT: I would think any protective order and/or
19 502(d) order you should submit let's say by the 18th, before
20 the holidays. Those are pretty straightforward. I don't see
21 why a case like this would create any particular issues.

22 MS. CANFIELD: And we have our standard that we'll
23 send over to Ms. Hagan.

24 THE COURT: Yeah, the standard orders that I have seen
25 from your office I don't have any problem with. I don't know

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1 if you have particular bells and whistles, Ms. Hagan, that you
2 want to include, but talk to Ms. Canfield about it. Lawyers
3 should be able to work out protective orders in relatively
4 straightforward employment discrimination cases, as this is.
5 So let's have that submitted to the Court by the 18th as well.

6 Anything else that we need the court reporter for?

7 Okay. So thank you very much. You'll order the
8 transcript from him and we'll talk among ourselves a little
9 more and maybe go in the jury room.

10 (Adjourned)

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